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No. 93-1674

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK and JOHN BORDEN,

Petitioners,

vs.

SHARON KARIBIAN and MARK URBAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF BROWN UNIVERSITY, JOHNS HOPKINS UNIVERSITY, THE NEW SCHOOL FOR SOCIAL RESEARCH, NEW YORK UNIVERSITY, PACE UNIVERSITY, PRESIDENTS COUNCIL, STATE UNIVERSITIES OF MICHIGAN, THE TRUSTEES OF PRINCETON UNIVERSITY, RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, STANFORD UNIVERSITY, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, THE UNIVERSITY OF ILLINOIS AND YESHIVA UNIVERSITY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Amici curiae, as above named, respectfully support the petition of petitioner, the Trustees of Columbia University in The City of New York ("Columbia University"), for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to review the decision and judgment dated January 25, 1994 in *Karibian v. Columbia University, et al.*, No. 93-7188, reported at 14 F.3d 773. The original consents of counsel for all parties to the filing of this brief are being filed concurrently herewith pursuant to Supreme Court Rule 37.2.

INTEREST OF AMICI

Both before and after this Court's decision in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), *amici* and other institutions of higher learning throughout the country have developed policies prohibiting sexual harassment. They have also initiated training to prevent and created mechanisms for faculty, employees and students to report (and for the institutions to investigate and remedy) prohibited conduct. The Court's language in *Meritor* and the ensuing advice of the EEOC further encouraged such institutions to believe that training and internal enforcement would advance the salutary purposes of Title VII[1] and, similarly, of Title IX.[2] These policies and procedures engage the victims of alleged harassment and the institutions in a cooperative problem-solving process: the complainant is encouraged and empowered to report harassment, and the institution undertakes an obligation to protect the victim and to take action, so that complaints are promptly addressed and effectively resolved.

By splitting with other Circuits in construing *Meritor*, the Second Circuit's decision will, unless modified, undermine this cooperative process and the goals it seeks to achieve. The court below has held that the existence — and, indeed, the effective operation — of mechanisms to investigate and redress harassment are irrelevant in determining whether an institution will be civilly liable for an employee's misconduct under a "hostile environment" theory. Under the Second Circuit's *respondeat superior* standard, an employer automatically "*is* liable" if a supervisor engages in sexual harassment, regardless of the institution's policy or efforts to create and preserve a hospitable environment. 14 F.3d at 780 (emphasis supplied). The Second Circuit's approach is antithetical to the remedial and educational purposes of Title VII and Title IX, is contrary to *Meritor*, and may actually discourage the development and use of effective self-regulating mechanisms in the academic tradition.

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[1] Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sections 2000e, *et seq.*

[2] Title IX of the Education Amendments of 1972, 20 U.S.C. Section 1681.

The interest of *amici* — a group of 23 American colleges and universities[3] — is not to limit the reach of Title VII, but to foster an environment in which prevention, prompt intervention and internal remediation are encouraged. *Amici* believe that a standard of liability should be reaffirmed which recognizes and takes account of institutional policies and effective actions designed to achieve the statutory goals. This objective was clearly endorsed by this Court in *Meritor*, and has been followed by the other Circuits which have considered it. However, it is substantially undercut by the decision below.

ARGUMENT

In *Meritor*, this Court confronted the difficult issues presented where a supervisor engages in proscribed conduct, but where the employer itself neither knows of nor condones the supervisor's actions. While declining "to issue a definitive rule on employer liability," 477 U.S. at 72, the Court suggested a flexible framework for such analysis: on the one hand, it found "that Congress wanted courts to look to agency principles in this area"; on the other, it found that Title VII also "evinces an intent to place some limits on the acts of employees for which employers . . . are to be found liable." *Ibid.* In searching for a reasoned standard, the Court explicitly rejected absolute employer liability. Thus, while *Meritor* cautions that, "the mere existence of a grievance procedure and a policy against discrimination, coupled with [the employee's] failure to invoke that procedure," will not necessarily "insulate [an employer] from liability," *id.* at 73, it also expressly finds that Title VII does *not* "impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case." *Ibid.*

Meritor does not spell out all the factors for courts to consider in "hostile environment" cases, but does identify as relevant the specific content of the employer's policy on prohibited conduct, as well as the efficacy of the employer's complaint resolution procedures. *Id.* at 72-73.

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[3] *Amici* include 11 individual colleges and universities and the Presidents Council, State Universities of Michigan, which consists of 12 public colleges and universities in that State.

The lessons of *Meritor* were not lost on either the EEOC or the higher education community. The EEOC has promulgated guidelines which explicitly encourage employers to:

> "take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their rights to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned."

Guidelines on Discrimination Because of Sex, 29 C.F.R. Section 1604.11(f). Consistent with these guidelines, the EEOC stressed the significance of an employer's policies and procedures in assessing employee complaints:

> "An effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented. The employer . . . should also have a procedure for resolving sexual harassment complaints. The procedure should be designed to 'encourage victims of harassment to come forward' . . . ."

EEOC: *Policy Guidance on Current Sexual Harassment Issues*, 8 Fair Empl. Pract. Manual (BNA) 405:6681 (March 19, 1990). Indeed, the EEOC has instructed its field personnel that when an employer has taken prompt, appropriate and effective remedial action, the Commission "normally will administratively close the charge." *Id.*, Section E(2).[4]

Colleges and universities (which are bound by Title IX as well as by Title VII) have taken the lead in developing policies and

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[4] In late 1993, the EEOC reiterated its adherence to the *Meritor* standard when it issued proposed guidelines with respect to harassment based upon race, color, religion, gender, national origin and disability. The Commision proposes to apply "the same standard of liability for harassment by supervisors" as for sexual harassment cases. 58 Fed. Reg. 51266, 51268 (October 1, 1993).

procedures to deal with sexual harassment.[5] Such policies and procedures do more than recite abstract prohibitions; they are designed to make members of the community aware of the kinds of actions which may be unwelcome to others, and to furnish a range of assistance and remedies to community members who may have been victimized by harassment. Like Columbia University, *amici* believe that the existence of these procedures not only sensitizes and educates the university community, but also demonstrates the university's commitment to fair treatment of all its members.

However, even if an employer has taken affirmative steps to prevent its employees from engaging in sexual harassment, and has established mechanisms to mitigate or redress improper behavior, the possibility always remains that an individual employee in a supervisory position will act in a manner inconsistent with expressed institutional values. In such cases, it does not serve the statutory goals to permit the lower courts to ignore the institution's policy and impose *per se* liability for repugnant individual conduct. On the contrary, such a standard would eviscerate *Meritor*, and would reduce the incentives for victims of hostile environments to seek cooperative solutions rather than to litigate. *Amici* do not suggest that the mere existence of nicely-drafted policies and procedures should be an absolute defense

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[5] Hundreds of institutions across the country have promulgated such policies. *See Sexual Harassment on Campus: A Legal Compendium*, National Association of College and University Attorneys (1988). Both the American Council on Education ("ACE") and the American Association of University Professors ("AAUP") have also been active in disseminating proposed policies and procedures to deter and deal with sexual harassment, specifically relying upon *Meritor* in framing their suggestions. The ACE and AAUP policy documents both stress that policies and procedures should educate members of the academic community to expected standards of conduct, and should encourage victims to come forward at an early stage so that problems may be solved. *See*, American Council on Education, *Sexual Harassment on Campus: a Policy and Program of Deterrence* (1992) at 1-4; American Association of University Professors, "Sexual Harassment: Suggested Policy and Procedures for Handling Complaints," *Policy Documents & Reports* (1990 ed.) at 113-115.

to liability. Where misconduct is known to and tolerated by an employer, paperwork alone will not cure the problem. But for institutions with diffuse, largely "horizontal" management structures — like colleges and universities — to be held absolutely liable for the unilateral acts of *any* supervisor who succeeds in ignoring an effective policy is not only unfair, but discourages institutional interest in pursuing and making a record of wrongdoing.[6] Such, however, is precisely the risk created by the inflexible standard adopted below.

Both the First and Sixth Circuits, along with others,[7] have adopted a "rule of reason" approach consistent with *Meritor*, the EEOC guidelines, and common sense.

In *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988), it was alleged that medical school faculty members/administrators had engaged in highly offensive conduct towards the plaintiff subordinate which created a "hostile environment." Faced with the question whether the institution should be held vicariously liable for the misconduct, the First Circuit relied on *Meritor* to reject a rule of absolute liability:

> "The gist of the Court's holding is not to be gleaned from strict adherence to agency principles, which, as the Court noted, were to be mere 'guidance,' *Meritor*, 477 U.S. at 72, n21, but rather from its definitive refusal to find employers 'always automatically liable.' *Id.* We take this statement to mean exactly what it says: that employers are not always automatically liable.
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> * * *
>
> "We therefore hold, following *Meritor*, that in a Title IX case, an educational institution is liable upon

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[6] Indeed, the fear of "creating a record" which could be used against them in subsequent litigation notwithstanding their own efforts to redress grievances could substantially undermine institutional commitment to respond aggressively to harassment claims.

[7] The rulings of other Circuits which have followed *Meritor* are discussed in the Petition for a Writ of Certiorari at pp. 10-11.

> a finding of hostile environment sexual harassment perpetrated by its supervisors upon employees *if an official representing that institution knew, or in the exercise of reasonable care, should have known, of the harassment's occurrence, unless that official can show that he or she took appropriate steps to halt it.*"

864 F.2d at 900-901; emphasis supplied.[8]

The Sixth Circuit very recently applied a similar "rule of reason" standard in *Reed v. Delta Airlines, Inc.*, ____ F.3d ____, 1994 U.S. App. LEXIS 3485 (6th Cir. Docket No. 93-5031, filed February 24, 1994, as amended April 13, 1994).[9] Despite serious and ongoing misconduct by a supervisor, the Circuit Court held that there was no basis for employer liability under *Meritor* where prompt and effective remedial action had been taken by the employer:

> "[T]he Supreme Court declined to prescribe a definitive rule on employer liability for harassment at the hands of supervisors. * * * Under established agency principles, the Court noted, absence of notice does not necessarily insulate the employer from liability; by the same token, however, there is no invariable rule of absolute liability for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known of the misconduct. The existence of a grievance procedure and a failure to invoke it are not necessarily dispositive, finally, although facts such as these are 'plainly relevant.' "

1994 U.S. App. LEXIS 3485, at *10-*13.

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[8] Although the *Lipsett* claim was brought under Title IX, the sexual harassment analysis is explicitly derived from Title VII case law. *Id.* at 896.

[9] The *Reed* decision was not recommended for full-text publication by the Sixth Circuit. While Sixth Circuit Rule 24(c) states that citation of unpublished decisions is "disfavored," the rule creates an exception where "counsel believes . . . that an unpublished decision has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well." We respectfully submit that the Rule 24(c) exception applies here.

By sharp contrast with the standards adopted by the other Circuits, the Second Circuit's decision below states that on a hostile environment claim against a supervisor, "the employer's liability is absolute." 14 F.3d at 780. In short, the decision below creates insurer's liability. Thus, despite Columbia's clear prohibition of sexual harassment, its procedures for redress of grievances, its lack of actual or imputed knowledge, and the actual steps which it took to protect Karibian and to remove the offending supervisor, the Second Circuit found that Columbia would have no defense to liability:

> "Applying these principles, we agree with Karibian that *Columbia would be liable for Urban's alleged harassment regardless of the absence of notice or the reasonableness of Columbia's complaint procedures.*"

14 F.3d at 780 (emphasis supplied).

The Second Circuit's *per se* approach to "hostile environment" claims will thus thwart the expectations of employers, based on *Meritor*, that their good-faith creation of policies and grievance procedures for self-remediation will be valued and weighed as a factor in Title VII enforcement, or that courts will evaluate the totality of the circumstances before finding liability. *Karibian* is predicated on a misapplication of agency rules which departs so significantly from *Meritor*, and differs so sharply from the more realistic standards adopted by other Circuits, as to present a jurisprudential issue meriting review by this Court.

In addition, the decision below creates other serious dilemmas arising from the conflicting demands of other laws.

For example, if an employer were automatically to be liable for a liaison between a supervisor and a subordinate which is later alleged (and ultimately found) to be unwelcome, employers might seek to minimize liability by discouraging all such relationships.[10]

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[10] These relationships can be particularly troublesome for colleges and universities, which are subject to the requirements of Title IX as well as Title VII. The relationships between students and faculty (and students and administrators) raise issues and concerns regarding the potential for sexual harassment not found in the traditional workplace.

However, some states, such as New York, prohibit employers from doing so.[11] In such a situation, an employer can now be put to a choice of regulating its employees' private lives lest their relationships intrude upon the workplace (and thus incurring possible liability for its own intrusion), or of disregarding the relationship (and incurring strict liability under the Second Circuit rule if it is later alleged and ultimately shown that the relationship was unwelcome). Both options present serious difficulties. It would be far more appropriate — and consistent with *Meritor* — to let the employer deal with the situation by maintaining a meaningful sexual harassment policy and procedure, and taking prompt, effective action when improper activity is observed or complained of.

For colleges and universities, the Second Circuit decision also escalates an existing tension between the goal of discouraging hostile environment harassment, and traditional values of academic freedom and free speech.[12] The argument can be made that a sexually (or racially, or religiously) hostile environment can be created through verbal expression, and may give rise to a claim under Title VII, Title IX, or Title VI.[13] At the same time, the educational community thrives on academic freedom, which must include both robust (and often sharp) debate, and the right to research, espouse and express unpopular ideas.

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[11] In New York, the "off-duty conduct statute" (New York Labor Law Section 201-d) is being used both by a discharged employee and by the State Attorney General to challenge a discharge based upon violation of a private employer's "no dating" rule for its employees. *See* Petition for a Writ of Certiorari at 15, n.9.

[12] *See Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

[13] Title VI of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000d, *et seq.* On March 10, 1994, the United States Department of Education published a notice of investigative guidance at 59 Fed. Reg. 11448 entitled *Racial Incidents and Harassment Against Students at Educational Institutions*, which sets forth its approach to on-campus racial incidents under Title VI, and expressly relies on sexual harassment and hostile environment precedent. *Id.* at 11449 and 11451, n.2.

Many in the academic community believe that a professor who adopts a provocative position with respect to gender, racial, ethnic or religious issues is entitled to the protections of academic freedom. Can that academic both enjoy individual protection for unpopular views *and* simultaneously create vicarious liability on the part of the university?[14] This difficult issue, while not now before the Court, exemplifies the painful dilemma which is created if an institution is forced to reconcile the tradition of academic freedom with the prospect of strict vicarious liability.

We submit that issues implicating academic freedom are uniquely well-suited to analysis through internal mechanisms within educational institutions, but that such analysis will be at least discouraged – if not potentially defeated – unless the Second Circuit ruling is modified to conform to the better-reasoned teaching of *Meritor*. Therefore, this Court should review the decision below and clearly disavow a strict liability rule.

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[14] *E.g.* "First Amendment Implications of Harassment Rules to be Studied," *The Chronicle of Higher Education*, April 27, 1994, p. A24, col. 1. In commenting on the Department of Education's approach (see note 13, *supra*), counsel for the American Council on Education has observed that the Government's definition of harassment "fails to distinguish between conduct that is primarily expressive, and thus is entitled to First Amendment protection, and conduct whose expressive content is incidental." *Ibid.* *See also* "A Sexual Harassment Case to Test Academic Freedom," *The New York Times*, May 11, 1994, p. D23, col. 1.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge that the Court grant the petition and issue a writ of *certiorari* to the Court of Appeals for the Second Circuit.

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Respectfully submitted,

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